A **SAYAT AHMAD NAZIR AHMAD**

v.

PP

B COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: C-05-42-03-2012]
C 30 DECEMBER 2013

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking - Evidence of negotiations between accused and agent provocateur for sale and purchase of drugs - Whether there was direct*
D *evidence of trafficking under s. 2 Dangerous Drugs Act 1952 - Whether act of trafficking clear and unrebutted - Trial judge's failure to state relevant provision of law when convicting appellant - Whether fatal and prejudicial to appellant - Whether there was misdirection by trial judge - Whether appellant failed to raise any reasonable doubt on prosecution's*
E *case*

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Trafficking - Evidence of negotiations between accused and agent provocateur for sale and purchase of drugs - Whether there was direct*
F *evidence of trafficking under s. 2 Dangerous Drugs Act 1952 - Whether act of trafficking clear and unrebutted - Trial judge's failure to state relevant provision of law when convicting appellant - Whether fatal and prejudicial to appellant - Whether there was misdirection by trial judge - Whether appellant failed to raise any reasonable doubt on the prosecution's*
G *case - Dangerous Drugs Act 1952, s. 39B(1)(a)*

The appellant was charged and tried at the High Court for trafficking in drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). It was the prosecution's evidence that SP6, acting as an agent provocateur, had met the appellant to discuss
H and finalise the purchase of dangerous drugs. Later that night, a police team led by SP5 waited for the appellant, who was seen walking towards SP6 with a sling bag ('exh. P6'). After SP6 showed the flash-roll money, the appellant showed the drugs at which time the police team arrested the appellant. The finding by
I the chemist SP4 confirmed that the contents of the two

transparent plastic bags found in exh. P6 contained 12.98 grammes of heroin and 13.66 grammes of monoacetylmorphine. The appellant, however, denied ever meeting SP6 before the arrest and denied knowledge of the drugs. The appellant's version was that he was asked by one Ali Johar to deliver the bag to a person at Shell Permatang Badak when he was arrested. The trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution's case. Thus, the appellant was convicted and sentenced to death under s. 39B(2) of the DDA. Hence, the appellant appealed. The appellant contended that there was a misdirection by the trial judge in that she had failed to decide on whether the conviction of the appellant was made under s. 2 with the aid of presumption under s. 37(da) of the DDA. It was submitted by the appellant that since the trial judge failed to state under which provision of law she was relying on, she may have relied on s. 37(d) read with s. 37(da) of the DDA, which would lead to a case of double presumption.

Held (dismissing appeal; affirming conviction and sentence)
Per Rohana Yusuf JCA delivering the judgment of the court:

(1) Knowledge may easily be inferred from the facts and circumstances in this case because there was direct evidence of trafficking under s. 2 of the DDA. There was evidence of negotiation on the sale of drugs that took place between the appellant and SP6. There was flash-roll money shown to complete the process. There was no necessity to invoke a presumption under s. 37(d) or s. 37(da) of the DDA on the facts and circumstances herein. (para 12)

(2) A case of trafficking founded on s. 2 of the DDA does not require the court to invoke a presumption of possession, custody or control. A case of trafficking under s. 2 of the DDA was sustainable when there is evidence to that effect which necessarily include the buying and selling of dangerous drugs. Herein, a trafficking case under s. 2 of the DDA was made out. The failure of the trial judge to state clearly in her judgment that the prosecution had made out a case of trafficking under s. 2 was not fatal on the facts of the present case as the evidence of trafficking was clear and remained unrebutted. (para 15)

(3) The failure of the trial judge to mention the relevant section of the law in her judgment was not fatal and prejudicial to the appellant. There was no miscarriage of justice since the appellant had every opportunity to raise a reasonable doubt on the prosecution's case. The trial judge had also given due consideration to the defence raised by the appellant and found that the appellant had failed to raise any reasonable doubt on the prosecution's case. There was therefore no merit in the grounds of appeal by the appellant. (paras 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh dan dibicarakan di Mahkamah Tinggi atas kesalahan pengedaran dadah di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Keterangan pihak pendakwaan menunjukkan bahawa SP6, bertindak sebagai ejen perangkap, telah bertemu dengan perayu untuk berbincang dan memuktamadkan pembelian dadah berbahaya. Pada malam tersebut, sepasukan polis yang diketuai oleh SP5 menunggu untuk perayu, yang dilihat berjalan ke arah SP6 dengan sebuah beg sandang ('eksh. P6'). Selepas SP6 menunjukkan wang kepada perayu, perayu pula menunjukkan dadah dan pada waktu itu pihak polis telah menahan perayu. Penemuan oleh ahli kimia SP4 mengesahkan bahawa kandungan kedua-dua beg plastik yang dijumpai dalam eksh. P6 mengandungi 12.98 gram heroin dan 13.44 gram monoacetylmorphine. Perayu, walau bagaimanapun, menafikan telah berjumpa dengan SP6 sebelum tangkapan dan menafikan pengetahuan mengenai dadah-dadah tersebut. Versi perayu adalah bahawa dia telah diminta oleh seorang yang bernama Ali Johar untuk menyampaikan beg itu kepada seorang individu di Shell Permatang Badak apabila dia ditahan. Hakim bicara mendapati bahawa perayu telah gagal membangkitkan keraguan munasabah dalam kes pendakwaan. Oleh itu, perayu telah ditangkap dan dijatuhkan hukuman mati di bawah s. 39B(2) ADB. Oleh itu, perayu merayu. Perayu menghujahkan bahawa terdapat satu salah arahan oleh hakim bicara apabila beliau gagal untuk memutuskan sama ada sabitan perayu dibuat di bawah s. 2 dengan bantuan anggapan di bawah s. 37(da) ADB. Perayu menghujahkan bahawa oleh kerana hakim bicara telah gagal untuk menyatakan peruntukan mana yang telah dirujuknya, beliau berkemungkinan telah bergantung kepada s. 37(d) dibaca bersama-sama dengan s. 37(da) ADB, yang akan membawa kepada kes anggapan berganda.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Pengetahuan mungkin mudah disimpulkan berdasarkan fakta-fakta dan hal keadaan kes ini kerana terdapat keterangan langsung pengedaran di bawah s. 2 ABD. Terdapat keterangan bahawa satu rundingan penjualan dadah berlaku antara perayu dan SP6. Terdapat wang yang ditunjukkan untuk menyelesaikan proses tersebut. Tiada keperluan untuk menggunakan anggapan di bawah s. 37(d) ADB atau s. 37(da) kepada fakta dan keadaan di sini.

(2) Satu kes pengedaran yang didapati atas s. 2 ADB tidak memerlukan mahkamah untuk menggunapakai anggapan milikan, jagaan dan kawalan. Kes pengedaran di bawah s. 2 ADB boleh dipertahankan apabila terdapat keterangan seperti itu yang memerlukan penjualan dan pembelian dadah berbahaya. Di sini, kes pengedaran bawah s. 2 ADB telah dibuktikan. Kegagalan hakim bicara untuk menyatakan dalam penghakimannya bahawa pihak pendakwaan telah membuktikan kes pengedaran bawah s. 2 tidak memudaratkan atas fakta kes ini kerana keterangan pengedaran adalah jelas dan kekal tidak disangkal.

(3) Kegagalan hakim bicara untuk menyebut seksyen undang-undang yang relevan dalam penghakimannya tidak memudaratkan dan tidak memprejudiskan perayu. Tiada salah laksana keadilan kerana perayu mempunyai peluang untuk membangkitkan keraguan munasabah atas kes pendakwaan. Hakim bicara juga telah memberi pertimbangan wajar kepada pembelaan yang telah dibangkitkan oleh perayu dan mendapati bahawa perayu telah gagal membangkitkan keraguan munasabah atas kes pendakwaan. Oleh itu, tiada merit dalam alasan-alasan rayuan yang dibangkitkan oleh perayu.

Case(s) referred to:

Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(foll)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2)

For the appellant - J Kuldeep Kumar; M/s J Kuldeep Kumar & Co
For the prosecution - Mangaiarkarasi Krishnan; DPP

[Appeal from High Court, Kuantan; Criminal Trial No: 45A-17-2011]

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf JCA:

[1] The appellant was charged and tried at the High Court of Malaya in Kuantan for trafficking in drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (DDA). At the end of the trial the appellant was convicted and sentenced to death under s. 39B(2) of the same Act. On 31 July 2013 we heard his appeal. By a unanimous decision we dismissed the appeal and we now give our reasons for our decision.

[2] This case involved an informer and agent provocateur. The prosecution case reveals the following facts. On 8 March 2011 at about 8 to 9pm, on the instruction of ASP Azli bin Mohd Nor (SP5), Constable Mohd Anuar bin Abdullah (SP6), acting as an agent provocateur, met the appellant at Area Tomyam, Permatang Badak to discuss a purchase of dangerous drugs. After the negotiation, SP6 informed SP5 that the appellant agreed to supply one pound of heroin at an agreed price of RM14,000. *Vide* a tele-conversation on 9 March 2011 at about 3.15pm the appellant informed SP6 that the drugs would be delivered later that night. A police team led by SP5 waited for the appellant at Shell Permatang Badak at about 8.30pm. Thirty minutes later, the appellant was seen walking towards SP6 with a sling bag (exh. P6) on him. After SP6 showed the flash-roll money the appellant showed the drugs. SP6 signalled the police team and they arrested the appellant. The appellant was caught with the sling bag still on him. After the arrest the appellant was brought to the house of SP3 (Mohd Osman) where another person by the name of Hasinah (SD2) was arrested. However SD2 was later released as she was not involved in the commission of the crime.

[3] Exhibit P6 was inspected by SP5 and was found to contain two transparent plastic packets inside a white plastic bag. Both transparent plastic packets contained green substance suspected to be heroin. The items found in the bag were one Timberland wallet (exh. P17); RM60,000; two pieces of appellant's photographs; appellant's NRIC (exh. P18) and a Nokia cell phone (exh. P19).

[4] The finding by the chemist Khairul Hadi bin Haji Abdul Raub (SP4) confirmed that the content of the two plastic packets were 12.98 gram of heroin and 13.66 gram of monoacetylmorphine.

[5] After the conclusion of the case for the prosecution, the learned trial judge came to a finding that the prosecution had made out a *prima facie* case against the appellant and thereupon called upon the appellant to enter his defence.

[6] The appellant elected to give evidence on oath. According to the appellant he and SD2 went to SP3's house two or three days prior to his arrest in order to take care of SP3's wife, Miriam who just gave birth. He said he was at SP3's house on the night of 8 March 2011 when the alleged negotiation took place. He denied that he ever met SP6 until the night of his arrest at Shell Permatang Badak. His version was that he was asked by one Ali Johar to deliver the bag (exh. P6), which he was told to contain monies on 9 March 2011 (the date of arrest), to a person at Shell Permatang Badak where he will be paid RM500. He then borrowed SP3's motorcycle and went straight to Shell Permatang Badak. Upon reaching the place he walked to SP6's car, he saw another person in the back seat. He was about to hand over the bag when police officers led by SP5 came and arrested him. The appellant denied that SP6 had shown him a flash-roll money. Likewise he also denied that he had any knowledge of the drugs on P6. The appellant informed the police that P6 belonged to Ali Johar and that he was delivering P6 on Ali's behalf. He also informed the police that Ali Johar was waiting for him at SP3's house after he delivered the bag.

[7] Having evaluated the defence of the appellant, the learned trial judge found that the appellant had failed to raise any reasonable doubt in the prosecution's case and convicted the appellant as per the charge and accordingly sentenced the appellant to death.

[8] The appellant raised a number of grounds in his petition of appeal. Before us learned counsel confined his argument to only one main issue. He contended that there was a misdirection by the learned trial judge in that she had failed to decide on whether the conviction of the appellant was made under s. 2 with the aid of presumption under s. 37(da) of the DDA.

[9] Before deliberating on the issue raised, it is pertinent to note the charge against the appellant, which we now produce below:

> Bahawa kamu Sayat Ahmad bin Nazir Ahmad pada 9 Mac 2011, lebih kurang jam 8.30 malam, di kawasan Stesyen Minyak Shell di lot 33408/9 Jalan Kuantan Bypass, di dalam daerah Kuantan, di dalam Negeri Pahang, didapati mengedar dadah berbahaya, berat bersih 26.64 gram (12.98 gram Heroin dan 13.66 gram Monoacetylmorphines) dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[10] We agree with the submission of learned counsel and it was also conceded by the learned Public Prosecutor that in her judgment the learned judge did not say or mention under which section of the DDA the appellant was convicted for trafficking of drugs. There was neither mention of s. 37(da) nor any deliberation on s. 2 of the DDA in the learned judge's written judgment.

[11] It was the learned counsel's submission that since the learned judge failed to state under which provision of the law she was relying on, she may have relied on s. 37(d) read with s. 37(da) of the DDA, which would lead to a case of a double presumption and hence infringing the rule against double presumption as decided in *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713; [2005] 2 MLJ 685, which affirmed the decision in *Muhammed Hassan v. PP* [1998] 2 CLJ 170; [1998] 2 MLJ 237.

[12] We are in agreement with the submission of learned Deputy Public Prosecutor that there was no necessity to invoke a presumption under s. 37(d) or s. 37(da) on the facts and circumstances of the present case. We say so for the following reasons. On the issue of possession and knowledge the learned judge in para. 4(b) of her judgment has this to say "Tiada kesilapan identiti OKT mengenai orang yang berurusan dengan

SP6 dan terjumpanya dadah bersama-sama OKT, menunjukkan OKT mempunyai milikan, kawalan, jagaan dan pengetahuan akan dadah yang dirampas. Beban bukti untuk menidakkannya adalah terletak ke atas OKT". A

Knowledge may easily be inferred from the facts and circumstances of this case because there was a direct evidence of trafficking under s. 2 of the DDA. There was evidence of negotiation on the sale of drugs that took place between the appellant and SP6. There was flash-roll money shown to complete the sale process. In the Federal Court case of *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560 a case involving agent provocateur, the Federal Court speaking through Chong Siew Fai CJ (Sabah & Sarawak) stated that: B C

> It was essential to bear in mind that the case of the prosecution was not based on custody or control of the cannabis thereby invoking the presumption of possession, or on possession of 200g or more cannabis thereby attracting the presumption of trafficking under s. 37(da) or (da)(iv) of the Act. The prosecution founded its case of trafficking on the sale of the cannabis to the police agent provocateur, the definition of trafficking is wide and includes buying, selling, varying, keeping and concealing dangerous drugs. D E

[13] From the above decision it is trite that a case of trafficking founded on s. 2 of the DDA does not require the court to invoke a presumption of possession, custody or control. This is because a case of trafficking under s. 2 of the DDA is sustainable when there is evidence to that effect which necessarily include the buying and selling of dangerous drugs. F

[14] In the present case the learned trial judge concluded that an offence of trafficking accordingly was made out when negotiation between the appellant and SP6 took place. Although she did not state the provision in her judgment she made the following findings; "Keterangan SP6 adalah jelas bahawa tawar menawar harga jualbeli dadah telah pun berlangsung di antara SP6 dan OKT. Tawar menawar yang di buat iaitu harga satu paun adalah RM14,000 setelah mendapati diskaun daripada RM15,000. Peguambela berhujah mengenai penggunaan bahasa dan maksud 'bare' yang tidak jelas sama ada ianya menunjuk kepada dadah. Apa yang jelas pada masa pertemuan SP6 dan OKT pada lebih kurang 9 malam adalah mengenai serah menyerah dadah yang hendak dijual oleh OKT dan di beli oleh SP6". G H I

From her conclusion the learned judge was clearly referring to the sale and purchase transaction that had taken place between the appellant and SP6, which constitutes an offence of trafficking under s. 2 of the DDA.

[15] We agree with the learned judge that, on the evidence appearing in the appeal records, a trafficking case under s. 2 of the DDA was made out. The failure of the learned judge to state clearly in her judgment that the prosecution had made out a case of trafficking under s. 2 in our view is not fatal on the facts of the present case as the evidence of trafficking is clear and remained unrebutted. We stand guided by the Federal Court decision in *PP v. Zulkifli Arshad* [2010] 6 CLJ 121; [2010] 6 MLJ 121. In that case the Federal Court held that although there was no mention of statutory presumption under s. 37(da) in that case, on evidence adduced and on the failure of both the trial judge and the Court of Appeal to invoke that presumption, it became incumbent upon the Federal Court to invoke the necessary presumption. Applying the same principle, we are of the view that the failure of the learned judge to mention the relevant section of the law in her judgment is not fatal and not prejudicial to the appellant. We do not find any miscarriage of justice since the appellant had every opportunity to raise a reasonable doubt on the prosecution's case. The learned trial judge had also given due consideration to the defence raised by the appellant in her judgment and found that the appellant had failed to raise any reasonable doubt on the prosecution's case.

[16] For the above reasons we do not find merit in the grounds of appeal by the appellant. On a totality of evidence, we find the conviction against the appellant safe. We affirmed the conviction and sentence passed by the learned trial judge.